92-751

Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a municipality's denial of a land use permit has been found to be arbitrary and capricious, does that finding automatically establish that the municipality is liable for damages under 42 U.S.C. § 1983 for a violation of the "substantive due process" rights of the landowner?

(2) Is such a municipality liable for damages under 42 U.S.C. § 1983 regardless of whether the landowner had a legitimate claim of entitlement to, or any other property interest in, the permit in question?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.[1]

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 119 Wash. 2d 91, 829 P.2d 746 (1992), and is reproduced in the Appendix ("App.") at 1a-

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the County of Snohomish is a municipality and, as such, has no parent companies or subsidiaries.

37a. The order of certification of the Court of Appeals of the State of Washington, Division I, certifying the case to the Washington Supreme Court is unreported and is reproduced at App. 38a. The decisions of the Superior Court for Snohomish County, Washington, are unreported and are reproduced at App. 41a to 51a.

JURISDICTION

The decision of the Washington Supreme Court was entered on May 14, 1992. Petitioners' motion for reconsideration was denied on July 30, 1992. The petition is therefore due on October 28, 1992. This court has jurisdiction under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983 (1988) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1988 (1988) provides in pertinent part:

> In any action or proceeding to enforce a provision of [42 U.S.C. §§ 1981, 1982, 1983,

> 1985, and 1986], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Washington Revised Code Sections 7.16.010-7.16.140, 36.70.020(7), 36.70.810, 36.70.820, 36.70.870, 36.70.970, and Chapters 42.36 and 64.40 (1989) are reproduced at App. 231a-241a. The Snohomish County Home Rule Charter, Article 2 (1987), is reproduced at App. 242a-247a. Snohomish County Code ("SCC") Sections 2.02.010, 2.02.020, 2.02.060, 2.02.100, 2.02.180, 2.02.190 (1990); and former Sections 18.08.190, 18.08.540, 18.18.010, 18.18.030, 18.20.010, 18.20.030, 18.88.060, and 18.88.070 (repealed 1989); are reproduced at App. 248a-254a.

STATEMENT

This is a Section 1983 case arising from the denial, by petitioner Snohomish County, of a "conditional use permit" sought by respondent landowner. In a prior decision, the Superior Court of Snohomish County had reversed that denial as "arbitrary and capricious" and ordered petitioners to grant the permit, which they did. In the decision from which review is sought, the Washington Supreme Court reversed a dismissal of damage claims and ordered summary judgment for respondent on the issue of the liability of petitioner County, under both 42 U.S.C. § 1983 and a state

statute, for damages for the temporary denial of the permit. The Washington Supreme Court held that the prior superior court ruling conclusively established that the County had deprived respondent of substantive due process rights guaranteed by the Fourteenth Amendment.[2]

Background

Under Washington zoning law, a "conditional use" of property is "a use listed among those classified in any given zone but permitted to locate only after review by . . . [a specified body—in the case of Snohomish County, a hearing examiner—after a public hearing] and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone. . . ."[3] In particular, in Snohomish County, in an area zoned RR 9600 (single family rural-residential with minimum lot area of 9,600 square feet) "hospitals, sanitariums and rest homes" may be permitted as a conditional use under SCC §§ 18.18.030 and 18.20.030. (App. 252a-253a).

On February 8, 1984, respondent Lutheran Day Care filed an application for a conditional use permit to construct a "rest home" on property zoned RR

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[2] Also named as defendants and appearing as petitioners in this Court are the Snohomish County Council and the Snohomish County Hearing Examiner. However, the county council members and the hearing examiner "have been named defendants only in their official capacities as representatives of the County," and only the County's liability is at issue. (App. 4a).

[3] Wash. Rev. Code § 36.70.020(7) (App. 234a); SCC § 18.08.190 (App. 251a); *see* Wash. Rev. Code §§ 36.70.810, .820, .870, .970 & ch. 42.36. (App. 234a-239a); SCC §§ 2.02.010, .020, .060, .100, .180, .190, 18.88.060 & 18.88.070 (App 248a-254a).

9600. (App. 199a). An amended application, seeking permission to erect a 77-dwelling unit structure, was denied by the Snohomish County Hearing Examiner on November 24, 1986. (App K).[4] The hearing examiner explained that a conditional use is permissible only if it can be made compatible with the uses allowed outright in the zone; he found that respondent's proposal could not be made compatible because of problems of traffic circulation, the bulk of the proposed structure, and the proposed density of usage of the property. (App. 111a-113a). Respondent appealed the hearing examiner's decision to the county council of Snohomish County, which on December 24, 1986 adopted the hearing examiner's findings and conclusions and affirmed his decision. (App. 94a); *see* SCC § 2.02.180 (App. 249a-251a).

Respondent then filed the present action in Snohomish County Superior Court. As subsequently amended, its complaint sought among other things (i) a state-statutory writ of certiorari under Wash. Rev. Code §§ 7.16.030-.140 (App. 231a-233a), to review the denial of the permit, and (ii) damages for the allegedly wrongful denial of the permit under (a) Wash. Rev.

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[4] Earlier, on February 22, 1985, the hearing examiner had returned the application to respondent for procedural defects. (App. 203a-229a). Respondent then submitted an amended application, which the hearing examiner denied after notice and hearing on July 3, 1985, on the ground that the proposed structure did not qualify as a "rest home" within the meaning of the ordinance. (App. 201a). This decision was affirmed by the Snohomish County Council (App. 164a) but reversed by the superior court, which held that the decision was "erroneous as a matter of law" and sent the matter back for a new hearing on the merits. (App. 158a-160a). That hearing was held on November 4, 1986 (App. 100a) and led to the hearing examiner's November 24, 1986 denial of the application on the merits. (App. 97a-115a).

Code § 64.40.020(1) (App. 239a-241a), (b) the state's common law of tortious interference, and (c) 42 U.S.C. § 1983. (App. 2a).

Respondent's demand for an order to review the denial of the permit was heard separately, before the court took up respondent's claims for damages. (The certiorari procedure is used only to correct improper judicial or quasi-judicial decisions; review is limited to the record before the judicial or quasi-judicial body; the only issue is whether its decision was correct, and "[c]onsiderations of culpability should not enter into the decision." (App. 21a-22a). On February 9, 1989 the superior court ruled that the county council's decision denying the permit had been arbitrary and capricious, finding that

> the internal circulation system, the bulk and dimensional elements of the project, the site plan, and the density of development, as proposed by [respondent], are reasonable and acceptable based upon the evidence in the record and upon the ascertainable standards of Snohomish County.

(App. 54a-55a). The court made no finding of any improper or invidious motive or irregular procedure. It remanded the matter for the issuance of a conditional use permit for the rest home on such technical preconditions as the hearing examiner might deem appropriate. (App. 55a). Five weeks later on March 15, 1989, the hearing examiner granted the conditional use permit subject to specified preconditions; respondent did not challenge that order, and its permit became effective on October 16, 1989. (App. 135a-140a).

On November 22, 1989, a different superior court judge dismissed respondent's damage claims with

prejudice. (App. 44a-45a). The court held that recovery under the state statute and state tort law was barred because, inter alia, the denial of the conditional use permit was a quasi-judicial act for which the county was immune from liability under state law. It rejected respondent's claim under 42 U.S.C. § 1983 on the ground that "[respondent] has not shown that the denial [of the permit] was made with purposeful discrimination or at least an allegation that the misdeeds were knowing or reckless." (App. 51a).

Proceedings in the Washington Supreme Court

Respondent appealed the dismissal of its damage claims to the state court of appeals, which certified the case to the Washington Supreme Court. That court accepted direct review and, on May 14, 1992, reversed and granted summary judgment to respondent on the issues of liability under Wash. Rev. Code § 64.40.020(1) and 42 U.S.C. § 1983.[5] The court also held that respondent is entitled to recover attorneys' fees under either Wash. Rev. Code § 64.40.020(2) or 42 U.S.C. § 1988, and remanded to the trial court to determine an appropriate award.

With respect to the state statutory damage claim, the Washington Supreme Court assumed that the county council and hearing examiner had been engaged in quasi-judicial acts, but it held that Wash. Rev. Code § 64.40.020 had eliminated, for cases covered by that section, a municipality's immunity from liability for quasi-judicial acts of its officials. (App. 6a

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[5] The court affirmed the dismissal of respondent's claim of tortious interference with its business expectancy on the ground that the county council's decision enjoyed immunity as a quasi-judicial action. (App. 35a).

and 18a). The court then ruled that the state certiorari proceeding had conclusively established that the County's decision to deny the conditional use permit had been arbitrary and capricious and that no additional finding of fault was necessary to establish liability under Wash. Rev. Code § 64.40.020(1). (App. 22a-23a).

With respect to the federal damage claims that are the subject of this petition, petitioners argued, inter alia, that respondent did not have a property right to the issuance of a conditional use permit and that there was in any event no denial of substantive due process. The Washington Supreme Court gave short shrift to the question whether respondent had a property right, saying only:

> Along with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim. . . . We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation.

(App. 32a-33a (quotation marks and citation omitted)). The court ignored the fact that, under the statute, issuance of a conditional use permit is inherently a discretionary decision that depends on an assessment, after a public hearing, of compatibility with the prevailing background use. *See* p. 4, *supra*.

The court then held that there is a violation of Fourteenth Amendment substantive due process whenever a land use decision is "arbitrary or capricious," and that the superior court had therefore erred in rejecting respondent's claim on the ground that

"the County did not act knowingly or recklessly in denying the permit." (App. 33a). It said that the

> finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies [the Fourteenth Amendment] standard. [Respondent] therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.[6]

(App. 33a).

REASONS FOR GRANTING THE PETITION

A. The Washington Supreme Court's Ruling That Any Land Use Decision That Is "Arbitrary and Capricious" Necessarily Denies Substantive Due Process in Violation of the Fourteenth Amendment Conflicts With Decisions of This Court, Another State Court of Last Resort, and Several United States Courts of Appeals.

In *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992), *petition for cert. filed*, 61 U.S.L.W. 3266 (U.S. Sept. 15, 1992) (No. 92-487) and *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992), *petition for cert. filed*, 61 U.S.L.W. 3266 (U.S. Sept. 15, 1992) (No. 92-487), the Washington Supreme Court expanded the concept of Fourteenth Amendment sub-

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[6] The Washington court ordered summary judgment of liability under both the state statute and 42 U.S.C. § 1983. Its interpretation of the state statute, while conclusive, is not a state ground precluding review of its interpretation of the federal statute. The Washington court treated the claims as separate, analyzed them independently, and sustained each of them. It did not examine the extent to which the damages and attorneys' fees awardable under the two provisions might overlap.

stantive due process as applied to land use regulation, and therefore the punishing reach of 42 U.S.C. § 1983 as applied to municipalities and their officials engaged in such regulation, well beyond the boundaries set by this Court and the federal courts of appeals. In the present case, in a decision rendered the same day as *Robinson* and *Sintra*, the Washington court engaged in a similar, inappropriate expansion: it held that whenever a denial of a land use permit has been reversed under state law as arbitrary and capricious, there has necessarily been a denial of substantive due process for which the landowner can recover damages under Section 1983.

The state court said quite explicitly that any arbitrariness sufficient to invalidate a permit denial is automatically sufficient to establish a violation of the Fourteenth Amendment and a federal right to damages:

> Such a violation is made out . . . if the decision to deny the permit is . . . "arbitrary or capricious". In the present case, the trial court can be interpreted as denying [respondent's] due process claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner's *finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies that standard.* Appellant therefore has established as a matter of law and fact that the County violated substantive

> due process when it denied the conditional use permit.

(App. 33a (emphasis added; citation omitted)). The court gave the earlier ruling this conclusive effect for purposes of the federal damage claim despite its clear recognition that the certiorari proceeding had not been concerned with any question of culpability:

> The certiorari procedure is used to correct improper judicial or quasi-judicial decisions. As such, the judge who is considering whether to grant relief under the writ is considering *only* whether the decision made below was correct. Considerations of culpability should not enter into the decision.

(App. 21a-22a (emphasis in original; citation omitted)).

The state court's holding that a state trial court's invalidation of a permit denial on grounds of "arbitrariness" automatically establishes liability under Section 1983 is quite wrong. This Court has recently reiterated, albeit in a different context, that the Due Process Clause of the Fourteenth Amendment does not reach, and Section 1983 does not remedy, the ordinary mistakes of state and local officials, even if they affect life, liberty or property. In *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992), the Court rejected a Section 1983 claim alleging that a municipality had denied an employee substantive due process because it failed to protect him against a known workplace hazard that led to his death. The Court said that, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-

ended." *Id.* at 1068. It added that " '[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property.' " *Id.* at 1069 n.10 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Court noted that there was no allegation of "a wilful violation of Collins' rights," *id.* at 1068-69, and held that, while the failure to warn might be tortious, it could not "properly be characterized *as arbitrary, or conscience-shocking, in a constitutional sense.*" *Id.* at 1070 (emphasis added).[7]

In the land use permit context, the distinction between arbitrariness amounting to error and the kind of deliberate or egregious misconduct that constitutes a deprivation of constitutional rights has been sharply drawn in recent years by a state court of last resort and several federal courts of appeals. *E.g.*, *Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 691 (Minn. 1991) (no § 1983 claim based on denial of a conditional use permit where a city's actions, although "at best, arbitrary," nevertheless "did not rise to the level of 'egregious' and 'irrational' conduct"); *Chiplin Enter., Inc. v. Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) (even bad faith refusal to issue a building permit in violation of state law did not violate substantive due process so as to give rise to § 1983 claim, when state remedies were available); *Brady v. Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (Section 1983 claim is stated only where permit is denied because of indefensible reasons such as "political animus"); *Midnight*

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[7] The Court quoted *Bishop v. Wood*, 426 U.S. 341, 350 (1976): "The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions'." *Collins*, 112 S.Ct. at 1070. *See Daniels v. Williams*, 474 U.S. 327, 332 (1986).

Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1668 (1992) (no due process violation unless applications denied for political, racial, or similar improper reasons); *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 467-468 (7th Cir. 1988) ("the fact that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws (or, we add, local ordinances) does not state a claim or denial of substantive due process") (quotation marks and citation omitted); *Condor Corp. v. St. Paul*, 912 F.2d 215, 280 (8th Cir. 1990) (denial of permit for a heliport held "arbitrary" but no substantive due process claim because denial not "egregious" or "irrational" such that the action exceeds standards of inadvertence or mere errors of law); *Sierra Lake Reserve v. Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991) (to establish violation of substantive due process, plaintiffs "must show that municipality's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare") (quotation marks and citation omitted); *MacKenzie v. Rockledge*, 920 F.2d 1554, 1558 (11th Cir. 1991) (plaintiff must show "improper motive"); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C.Cir.), *cert. denied*, 488 U.S. 956 (1988) ("[o]nly a substantial perversion of state law prompted by personal or group animus, or deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983").[8]

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[8] The D.C. Circuit drew the same distinction in a different context:

> [The doctrine of substantive due process] does not

In the present case, the superior court, hearing the state-certiorari challenge to the denial of respondent's application, had no jurisdiction to consider whether petitioners had engaged in "culpable" conduct, *see* p. 6, *supra*, and certainly did not make any finding on which a conclusive determination of Section 1983 liability could be based under the tests set forth in the cases cited above. While petitioners' denial of a conditional use permit was held to have been unjustified, the ruling, to which the Washington Supreme Court gave conclusive effect for purposes of a federal law damage award, said nothing at all about an improper or suspect motive and made no finding that there had been any conduct that was "arbitrary, or

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> protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'

Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted).

Other cases include *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Pace Resources, Inc. v. Shrewsbury*, 808 F.2d 1023 (3rd Cir.), *cert. denied*, 482 U.S. 906 (1987); *Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980); *New Burnham Prairie Homes, Inc. v. Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990); *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, J., concurring); *Dean Tarry Corp. v. Friedlander*, 650 F. Supp. 1544 (S.D.N.Y. 1987), *aff'd*, 826 F./2d 210 (2d Cir. (1987); *see generally Pearson v. Grand Blanc*, 961 F.2d 1211, 1220-23 (6th Cir. 1992) (cataloguing cases).

conscience-shocking, in a constitutional sense." *See Collins,* 112 S.Ct. at 1070.[9]

If the Washington Supreme Court were right, virtually any erroneous exercise of local governmental discretion to deny a permit of any sort to a landowner would entitle the landowner not only to reversal of the decision but also to damages under federal law. The result would be to federalize what ought to be state procedures for correcting state errors and to threaten local decisionmakers with federal law damages for judgments they should be able to make without fear. That threat ought to be reserved for local action that is "egregiously unacceptable, outrageous, or conscience shocking." *Amsten v. Moran,* 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied,* 111 S.Ct. 713 (1991).

B. The Washington Court Failed To Consider Whether Respondent Had Any Property Interest—Any "Legitimate Claim of Entitlement"—to a Conditional Use Permit of Which It Was Deprived.

A Section 1983 claim based on the Fourteenth Amendment lies only if the plaintiff has been deprived of "life, liberty or property." Here, the Washington Supreme Court apparently assumed that respondent had a property interest in—*i.e.*, a legitimate claim of

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[9] Neither the superior court nor the Washington Supreme Court suggested that the term "arbitrary and capricious," as used by the superior court, meant "invidious" or "discriminatory" or "conscience-shocking," rather than having its common meaning that the decision was not justified in light of the record. "Arbitrary and capricious" is the standard of review prescribed by the Washington Revised Code for a wide variety of decisions. *E.g.*, Wash. Rev. Code § 41.64.130 (state personnel decisions); § 67.04.130 (invalidation of contracts signed by minors).

entitlement to—the issuance of a conditional use permit. Although petitioners challenged this point, the Washington court attempted no analysis except to state that it saw no reason to treat the denial of the conditional use permit any differently than the denial of a building permit. (App. 32a). The court erred in refusing to analyze whether respondent had been denied any protected property interest.

The very case that the Washington court relied on for the proposition that a landowner has a property interest in an application for a building permit demonstrates that not all permit applications will support substantive due process claims. In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the court first noted that where a substantive due process claim is based on the allegedly wrongful denial of a permit, an essential element of that claim is a protectable property interest, as of the time of the alleged denial, in the issuance of the permit. 857 F.2d at 1305. The court then held that while the plaintiff *did* have a protectable property interest in a building permit, he did *not* have any protectable property interest in approval of his application for a "minor plat," *id.* at 1305, because the approval of a minor plat was discretionary and he therefore did not have a "legitimate claim of entitlement" within the meaning of *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[10]

The analytical framework for such cases has been outlined by the Second Circuit:

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[10] Similarly, in *Lemke v. Cass County*, 846 F.2d 469, 470-71 (8th Cir. 1987), the court said, "Whether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit. . . ."

> The analytical framework applicable to constitutional challenges to land regulation was affected by the Supreme Court's 1972 decisions in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Though concerned with an interest in employment, rather than land, and the protection of procedural, rather than substantive, due process, both decisions were potentially pertinent to land regulation in their announcement that a property interest, within the meaning of the Fourteenth Amendment, includes not only what is owned but also, in some limited circumstances, what is sought. This expanded concept of property, however, *requires more than "an abstract need or desire" or "a unilateral expectation" of what is sought. Board of Regents v. Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709. *Instead, there must be "a legitimate claim of entitlement." Id.; see Perry v. Sindermann, supra*, 408 U.S. at 601.

R.R.I. Realty Corp., Inc. v. Southampton, 870 F.2d 911, 915 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) (emphasis added).

In *Bateson*, the distinction between the building permit and the minor plat, both of which plaintiff sought, was that issuance of the former was mandatory while approval of the latter was discretionary. On the one hand,

> [t]he City of Billings' regulations provide that once an applicant's building plans comply

> with the code and other applicable laws and the fees are paid, the building official *must* issue a building permit to the applicant. . . . These regulations do not provide for review by the City Council before a building permit can issue.

857 F.2d at 1303 (emphasis in original). On the other hand, Bateson did *not* have a legitimate claim of entitlement to approval of a minor plat because he "failed to show that state or local law created an entitlement to approval of the proposed minor plat. The applicable municipal ordinance . . . specifically authorizes the City Council to approve, conditionally approve or reject a minor plat." *Id.* at 1305 (emphasis added).

Petitioners argued that under Washington law and Snohomish County ordinances respondent could not have a protected property interest in the issuance of a conditional use permit at any time before the superior court's order on state certiorari. The basis for this argument was that the law requires an applicant to submit to a process in which the decisionmaker (here, the county council) has the explicit power and obligation to impose preconditions it finds necessary that will "make the [proposed] use compatible with other permitted uses in the same vicinity and zone." *See* p. 4, *supra*. The Washington Planning Enabling Act for Counties, Wash. Rev. Code ch. 36.70, establishes the standard for granting conditional use permits:

> "Conditional use" means a use listed among those classified in any given zone but permitted to locate only after review by the

> board of adjustment, or zoning adjuster if there be such, and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities, provided the county ordinances specify the standards and criteria that shall be applied.

Wash. Rev. Code § 36.70.020(7). (App. 233a-234a). The statute recognizes that some uses may or may not be compatible with a particular zone "depending upon where they are located and how they are actually developed." R. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.10, at 52 (1983).

The range of discretion inherent in this process is shown in the Snohomish County Code provisions setting forth the factors that the hearing examiner is to consider in deciding whether to grant the conditional use permit. SCC § 18.88.060. (App. 253a-254a). These provisions suggest on their face that the process is highly discretionary and that the land owner has no "legitimate claim of entitlement" until the process is completed and the conditions on which the permit will be issued have been specified.

We recognize, of course, that the Washington Supreme Court is the highest authority on the meaning of the pertinent state statutes and county ordinances, and that its interpretations of these provisions could substantially affect whether respondent had any "property" interest within the meaning of the Fourteenth Amendment. But possessing this authority is not the same as exercising it. The court wholly failed

to conduct the analysis necessary to determine whether respondent could have been deprived of "property" by petitioners' actions. It was error to award respondent summary judgment of liability on a claim under the Fourteenth Amendment without analyzing one of the essential elements of that claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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